



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

E. Elliott Johnson
RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

JUL 27 3 24 PM '95

July 27, 1995

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Rita Reimer
Staff Attorney

SUBJECT: Draft AO 1995-25

*Disclaimers
Paid for ---*

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for August 3, 1995.

Attachment

AGENDA ITEM
For Meeting of: **AUG 3 1995**

1
2
3 ADVISORY OPINION 1995-25

4 David A. Norcross, General Counsel
5 Republican National Committee
6 310 First Street SE
7 Washington, DC 20003

DRAFT

8 Dear Mr. Norcross:

9 This responds to your letter dated June 27, 1995,
10 requesting an advisory opinion on behalf of the Republican
11 National Committee ("RNC"), concerning the application of the
12 Federal Election Campaign Act of 1971, as amended ("the
13 Act"), to costs incurred by the RNC in connection with
14 certain activities to be undertaken in 1995.

15 You state that the RNC plans to produce and air media
16 advertisements on a series of legislative proposals being
17 considered by the U.S. Congress, such as the balanced budget
18 debate and welfare reform. The purpose of the ads will be to
19 inform the American people on the Republican and Democratic
20 positions on these issues, as well as to attempt to influence
21 public opinion on particular legislative proposals. The ads
22 are intended to gain popular support for the Republican
23 position on given legislative measures, and thereby influence
24 the public's positive view of Republicans and their agenda.

25 You further state that your request is predicated on the
26 following assumptions: (1) There may or may not be a
27 reference to a Federal officeholder who has also qualified as
28 a candidate for Federal office. (2) If there is reference to
29
30

4 a Federal officeholder who is also a Federal candidate, there
5 will not be any express advocacy of that officeholder's
6 election or defeat, nor will there be any "electioneering
7 message" or reference to Federal elections.^{1/} (3) If there
8 is a "call to action," it will be to urge the viewer or
9 listener to contact that Federal officeholder urging support
10 for, or defeat of, a particular piece of legislation. (4)
11 The appropriate Federal Communications Commission disclaimer
12 identifying the RNC as sponsor will be included within each
13 advertisement. (5) The RNC will allocate the salaries of
14 employees associated with this media effort based upon 11 CFR
15 106.5. (6) The RNC will report this media activity and its
associated expenses, as appropriate, on financial disclosure
reports filed with the Commission.

17 You state that it is impossible to determine what effect
18 these types of advertisements have on the electability of
19 candidates at the Federal, state and local level. You
20 believe the costs incurred in connection with these ads

21
22 ^{1/} The Commission relies on your statement that those
23 advertisements that mention a Federal candidate or
24 officeholder will not contain any electioneering message. In
25 view of this representation, the Commission does not express
26 any opinion as to what is or is not an electioneering message
27 by a political party committee. The courts and the
28 Commission have addressed the issue of what constitutes an
electioneering message by a political party in other
circumstances. See Advisory Opinions 1984-15 and 1985-14;
Federal Election Commission v. Colorado Republican Federal
Campaign Committee, Nos. 93-1433 and 93-1434, 1995 WESTLAW
372934 (10th Cir. (Colo.), June 23, 1995).

should be considered "administrative expenditures" under the Commission's rules on allocation of certain expenditures between Federal and non-federal accounts.^{2/} If so considered, the regulations provide that the costs should be allocated at least 60% to the RNC's Federal campaign account and 40% to its non-federal account. See 11 CFR 106.5(a) and (b)(2)(ii).

The Act requires that contributions accepted and spent to influence any Federal election be received subject to certain limitations and prohibitions. See 2 U.S.C. §§441a-441c and 441e-441g. Most of these restrictions do not apply to funds raised and spent to influence only state and local elections.^{3/}

Commission regulations set forth the procedures to be followed by party committees that make disbursements in connection with both Federal and non-federal elections.

^{2/} Your letter makes reference to past conduct of the Democratic National Committee ("DNC"). The Commission stresses that this advisory opinion does not address those issues or imply any opinion whether the DNC's conduct was permitted or not permitted under the Act and Commission regulations. Commission regulations state that requests regarding the activities of third parties do not qualify as advisory opinion requests. 11 CFR 112.1(b).

^{3/} The prohibitions on contributions by national banks, by corporations organized by authority of Federal statute, and by foreign nationals, apply to contributions made in connection with any election whether Federal, state or local. 2 U.S.C. §§441b(a), 441e.

3
4 11 CFR 106.5. Under section 106.5(a), party committees^{4/} may
5 make such disbursements in one of two ways: They may make
6 them entirely from funds raised subject to the prohibitions
7 and limitations of the Act; or, if they have established
8 separate Federal and non-federal accounts pursuant to 11 CFR
9 102.5, they may allocate them between these accounts
10 according to various formulas set forth in section 106.5.

11 The allocation formulas for national party committees to
12 allocate their administrative expenses and generic voter
13 drive costs are found at 11 CFR 106.5(b)(2). The Explanation
14 and Justification to these rules notes that these formulas
15 reflect the national party committees' primary focus on
16 presidential and other Federal candidates and elections,
17 while still recognizing that such committees also participate
18 in party-building activities at state and local levels of the
19 party organizations. 55 Fed. Reg. 26058, 26063 (June 26,
20 1990).

21 The Commission agrees that the legislative advocacy
22 media advertisements discussed in your letter, focusing as
23 they do on national legislative activity, will have impact on
24 both Federal and non-federal elections. Thus, these costs

25 ^{4/} The Commission notes that this opinion applies only to
26 covered activity by national party committees. It does not
27 apply to legislative issue advocacy by other entities, such
28 as lobbying expenditures by corporations and their separate
29 segregated funds. See Advisory Opinion 1984-57.
30

3 should be allocated in accordance with 11 CFR 106.5. The
4 Supreme Court in Buckley v. Valeo, 424 U.S. 1, 79 (1976),
5 noted that the major purpose of political committees is the
6 nomination or election of candidates, so their expenditures
7 are, by definition, campaign related. Similarly, the
8 Internal Revenue Code defines the "(tax) exempt function" of
9 a political organization, including a political party or
10 committee, as "the function of influencing or attempting to
11 influence the selection, nomination, election or appointment
12 of any individual to any Federal, State, or local public
13 office . . . or the election of Presidential or Vice
14 Presidential electors." 26 U.S.C. §527(e).

15 Section 106.5(a)(2) establishes four categories of costs
16 to be allocated under these rules: administrative expenses;
17 the direct costs of a fundraising program or event; the cost
18 of activities that are exempt from the definitions of
19 contribution and expenditure because they relate to specific
20 state and local party activity; and generic voter drive
21 costs.

22 You state that you believe the costs of the
23 advertisements should be characterized as administrative
24 expenses, which are defined in a non-inclusive listing at 11
25 CFR 106.5(a)(2)(i) to include such expenses as rent,
26 utilities, office supplies, and salaries. *It is all possible*
27 ~~The Commission~~
28 ~~believes~~ that some portion of these costs could also be
29
30

3 characterized as generic voter drive costs, which are defined
4 at 11 CFR 106.5(a)(2)(iv) to include, inter alia, costs of
5 "activities that urge the general public to register, vote or
6 support candidates of a particular party or associated with a
7 particular issue, without mentioning a specific candidate."

8 Although you state that the advertisements in question will
9 not reference Federal elections or contain an electioneering
10 message, their stated purpose, to gain popular support for
11 the Republican position on given legislative measures and to
12 influence the public's positive view of Republicans and their
13 agenda, encompasses the related goal of electing Republican
14 candidates to Federal office. This result is also
15 contemplated by the Commission's regulations at 11 CFR
16 110.8(e), which recognize that certain party-building
17 activities under specific conditions can feature the
18 appearance of the party's candidates at a "bona fide party
19 event or appearance." Advocacy of the party's legislative
20 agenda is one aspect of building or promoting support for the
21 party that will carry forward to its future election
22 campaigns.

23 For purposes of the allocation rules, however, it is
24 immaterial whether these costs are characterized as
25 administrative costs or as generic voter drive costs. Under
26 11 CFR 106.5(b)(2), the costs of both types of activities are
27 allocated 60% to the Federal account and 40% to the
28

4 non-federal account in non-presidential election years, and
5 65% to the Federal account and 35% to the non-federal account
6 in presidential election years. FEC Schedules H3 and H4, on
7 which joint activity is reported, similarly do not
8 distinguish between administrative and voter drive costs.
9 Rather, they classify them jointly as "administrative/voter
drive" costs.

10 Since 1995 is a non-presidential election year, the
11 Commission concludes that the proper allocation for these
12 expenditures is at least 60% to the Federal account, with a
13 corresponding allocation to the non-federal account.^{5/}
14 Should the RNC continue these activities into 1996, a
15 presidential election year, the Federal share will rise to at
16 least 65% of these costs.

17
18
19
20
21
22
23
24 ^{5/} The Commission notes that, while committees are free to
25 allocate a higher percentage of the disbursement to their
26 Federal accounts (the language in section 106.5(b)(2)(i)
27 reads at least 60%)(emphasis added), they may not so allocate
28 less than the specified percentages. See Explanation and
29 Justification to the Final Rules on Methods of Allocation
30 Between Federal and Non-Federal Accounts, 55 Fed. Reg. 26058,
26063 (June 26, 1990).

4 This response constitutes an advisory opinion concerning
5 application of the Act, or regulations prescribed by the
6 Commission, to the specific transaction or activity set forth
7 in your request. See 2 U.S.C. §437f.

8 Sincerely,

9
10 Danny Lee McDonald
11 Chairman

12 Enclosures (AOs 1985-14, 1984-57 and 1984-15)
13
14
15
17
18
19
20
21
22
23
24
25
26
27
28
30